

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 1000 OF 2012

The Royal Bank of Scotland N.V.)
(formerly known as ABN AMRO Bank N.V.))
a Banking Company incorporated under the)
laws of the Netherlands, carrying on banking)
business in India and having its registered)
office at Netherlands and its Corporate office)
at 31/32, Sakhar Bhavan, Nariman Point,)
Mumbai, Mumbai 400 021.)Petitioner/
) Original Claimant

Versus

Earnest Business Services Private Limited, a)
company incorporated under the Companies)
Act, 1956, having its registered office at)
17th Floor, Earnest House, 194, Nariman Point,)
Mumbai 21)Respondent

Ms. Sowmya Srikrishna a/w. Mr. Darmesh Jain and Tejas
Mahumani i/b. Anil T. Agarwal for petitioner.
Mr. Chetan Kapadia i/b. Deepa Pohnu for respondent.

CORAM : K.R. SHRIRAM, J.

DATE : 20th September, 2017

ORAL JUDGMENT :-

1. This petition is filed under section 37 of the Arbitration and Conciliation Act, 1996 (for brevity 'the said Act') impugning an order dated 14th May, 2012 passed by the learned Arbitrator accepting the application of the respondent under section 16 of the said Act.

2. The dispute can be summarized as under :-

(i) Petitioner had entered into with respondent an agreement dated 11th July, 2007 titled as “Agreement to Provide Business Centre Facilities” (hereinafter referred to as 'the Facilities Agreement') and another agreement of even date titled as “Agreement for Support Services” (hereinafter referred to as 'the Services Agreement') whereby petitioner was allowed to use cabins, work stations, table spaces, reception, cloak rooms, located on the 17th floor of a building by name “Earnest Business Services Private Limited” at Nariman Point, Mumbai for a period of 36 months commencing from 1st August, 2007 to 31st July, 2010.

(ii) Petitioner agreed to pay to respondent a consolidated sum of Rs.10,50,000/- per month under the Facilities Agreement. Petitioner also agreed to give and gave under the Facilities Agreement an interest free amount aggregating to Rs.63,00,000/- towards due performance of the Facilities Agreement. This amount of Rs.63,00,000/- was to be refunded without interest subject to deductions/adjustments/setoffs provided in the Facilities Agreement within one working day from expiry of the Facilities Agreement or sooner determination thereof.

(iii) It was also agreed that if the security deposit was not refunded within the time prescribed in the agreement, petitioner would be paid interest at the rate of 15% per annum on the said amount of security deposit after deductions and adjustments and an additional amount of Rs.6,000/- per day by way of damages until refund of such amount of security deposit after deductions and adjustments.

(iv) Under the Support Services Agreement, petitioner was to pay a sum of Rs.7,00,000/- per month as service charges and the same was payable every six months in advance by petitioner to respondent. Petitioner also agreed to give and gave a sum of Rs.42,00,000/- as security deposit under the Services Agreement, which amount was to be refunded without interest subject to deductions/adjustments/set offs provided in the Services Agreement within one working day of expiry of the Services Agreement or sooner determination thereof. It was also agreed that if this amount of Rs.42,00,000/- of security deposit was not refunded as agreed, petitioner was entitled to interest at the rate of 15% per annum on the amount of Rs.42,00,000/- less permissible deductions/setoffs and the further amount of Rs.4,000/- per day by way of damages until refund of such amount of security deposit.

3. For reasons which we need not go into in this petition, petitioner chose to terminate the Facilities Agreement allegedly by a letter dated 18th May, 2009. It is the case of respondent that it never received this termination notice. The admitted position, however, is that the possession was handed over by petitioner to respondent on

17th August, 2009. Both the agreements provided for Arbitration and the Arbitration Clause, which are identical, reads as under :-

“ In the event of any claims, dispute, difference arising between EBS and the Client as to any clause or provisions of this Agreement or as to the interpretation thereof or as to the rights, liabilities or acts or omissions of any party arising out of or by virtue of this Agreement or otherwise in any way relating hereto, such claims or disputes or differences shall be referred to one Arbitrator preferably an Ex-Judge of the Bombay High court as may be mutually agreed by the parties and such arbitration shall be held in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory re-enactment or modification thereof for the time being in force. The award of the Arbitrators shall be final and binding on the Parties. The arbitration proceedings shall be held in Mumbai. Each Party shall pay their respective Arbitration Fees. ”

4. Petitioner filed a petition under Section 9 of the said Act being Arbitration Petition No.1002 of 2009 for interim reliefs and by consent, the dispute was referred to sole arbitration of Mrs. Justice K.K. Baam, a former Judge of this Court. By an order dated 17th June, 2011, the learned Arbitrator entered into reference.

5. Petitioner filed statement of claim, claiming :-

Particulars of Claims

Security Deposit under Facilities Agreement	Rs. 63,00,000/-
Add : Interest @ 15 % p.a. from 18.08.2009 to 31.08.2011 i.e. 744 days	Rs. 19,26,247/-
Security Deposit under the Services Agreement	Rs. 53,10,000/-
Add : Interest @ 15% p.a. from 18.08.2009 to 31.08.2011 i.e. 744 days	Rs. 16,23,551/-
Total	Rs. 1,51,59,798/-

Particulars of Claims

Damages under Facilities Agreement @ Rs. 6000 per day from 18.08.2009 to 31.08.2011 i.e. 744 days	Rs. 44,64,000/-
Damages under Services Agreement @ Rs. 4000 per day from 18.08.2009 to 31.08.2011 i.e. 744 days	Rs. 29,76,000/-
Total	Rs. 74,40,000/-

In response to the statement of claim filed by petitioner, respondent filed an application under section 16 of the said Act stating that the Arbitral Tribunal had no jurisdiction. According to respondent, the jurisdiction to decide petitioner's claim would solely vest with the Small Causes Court. The respondent submitted that the dispute between petitioner and respondent are not arbitrable because of the crucial words in sub-section (1) of section 41 of the Presidency Town Small Causes Court Act, 1882 (for brevity 'Small Causes Courts Act') which are as under :-

“ relating to the recovery of possession of any immovable property situated in Greater Bombay, or relating to the recovery of the licence fee or charges or rent therefor ”.

6. Admittedly, possession was not an issue to the claim. Respondent, however, submitted that the claim made by petitioner for refund of security deposit and for damages would come under the category of 'charges' used in Small Causes Court Act and, therefore, the dispute cannot be arbitrated upon and petitioner will have to invoke the powers of Small Causes Court.

7. After hearing the parties, the learned Arbitrator came to the

conclusion that though the two agreements are titled as Facilities Agreement and Services Agreement, in effect, they are Licence Agreements and the Arbitrator accepted the submissions of the respondent that the claim for refund of security deposit and for liquidated damages would come under the category 'charges' used in Section 41(1) of Small Causes Court Act and hence not arbitrable. Of course, counsel for petitioner submitted here and also submitted before the Arbitrator that the two agreements cannot be equated to be a Licence Agreement. But, even if for any reason, the Arbitral Tribunal or this Court comes to a conclusion that it is to be considered as a Licence Agreement, still claim for refund of security deposit and liquidated damages under the agreement cannot be 'charges' provided in sub-section (1) of Section 41 of the Small Cause Courts Act.

8. It will be useful to reproduce paragraphs 18, 19 and 20 of the impugned order by which the Arbitrator has come to the conclusion that the claim made by the petitioner falls under 'charges' and hence within the scope of dispute to be decided under Section 41 of the Small Cause Courts Act. Paragraphs 18, 19 and 20 read thus :-

“ 18. One fact is required to be noted and that the claim filed by the Claimants pertains to the recovery of the security deposit, the security deposit falls under the heading of charge which under the provisions of Section 41 of the Presidency Town Small Causes Court Act, falls within the scope of the dispute to be decided under Section 41 of Presidency Town Small Causes Court Act. On this aspect whether by virtue of the fact that the claim filed by the Claimants is for the refund of the security deposit and interest on the same which deposit was related to the premises given on leave and licence basis and therefore falls within the jurisdiction of Presidency Town Small Causes Court Act.

19. Reliance is being placed on two judgements, one is the *Judgement of Justice S.U. Kamdar as reported in '2006 (4) Bom. C.R. 437 RMC Readymix (I) P. Ltd. ..Plaintiffs vs. Kanayo Khubchand Motwani ..Defendants* and the other is the *Judgement of Justice Mohata as reported in '2010 (2) Bom. C.R. 223 Genesis Colors Private Limited ..Petitioner Vs. Anil Ramlabhaya Suri & Anr. ..Respondents'* wherein it is held that recovery of the security deposit falls within the definition of charge and falls within the exclusive jurisdiction of Section 41 of Presidency Town Small Causes Court Act.

20. There are two Rulings of the Hon'ble High Court, the question pertaining to the arbitrability of the disputes as observed in '*AIR 1980 Karnataka 92 Full Bench Govindanaik G. Kalaghatigi ..Petitioner Vs. West Patent Press Co. Ltd. & Anr. ..Respondents'*', wherein it is observed that there are two decisions of the Hon'ble Supreme Court on a question of law cannot be reconciled and if both Benches of Hon'ble Supreme Court consists of equal number of Judges the latter of the two decisions should be followed by the Hon'ble High Court and other Courts. In the light of these aforesaid Rulings the *Judgement of Justice Mohata* which is later in point of time has to be followed and further under the agreement recovery of security money is termed as charge, therefore the dispute pertaining to the said recovery is not arbitrable and cannot be referred to the Tribunal.

9. The Arbitrator, it has to be noted, first of all has not analyzed as to how the claim of petitioner which are for refund of security deposit and liquidated damages would come under the category of 'charges' used in Section 41(1) of Small Causes Court Act.

Secondly, the Arbitrator has placed reliance on the judgment of a Single Judge of this Court in ***Genesis Colors Private Limited v/s. Anil Ramlabhaya Suri & Anr.***¹ and stated “wherein it is held that recovery of security deposit falls within the definition of 'charge' and

1 2010(2) Bom.C.R. 223

falls within the exclusive jurisdiction of Section 41 of Presidency Small Cause Courts Act”. To a query posed by the Court, Mr. Kapadia, learned counsel appearing on behalf of respondent, in fairness agreed that the decision in *Genesis Colors Private Limited (supra)* does not state anywhere that “refund of security deposit” falls within the definition of 'charges'.

10. Therefore, on this ground alone one can conclude that the learned Arbitrator has erred in coming to the conclusion that the Arbitrator has no jurisdiction and the dispute should be prosecuted before the Small Causes Court.

11. At the same time, Ms. Srikrishna, counsel for petitioner, also relied on various judgments of this Court namely :-

(i) RMC Readymix (I) P. Ltd V/s. Kanayo Khubchand Motwani²

(ii) BNP Paribas Securities India Pvt. Ltd., Mumbai V/s. Cable Corporation of India Ltd., Mumbai³

(iii) Equani Technology Services (India) Pvt. Ltd. V/s. Vikhroli Corporative Park Pvt. Ltd.⁴

(iv) Sanjog Sadanand Parab V/s. B.P. Gharda & Co. & Ors.⁵

(v) Brainvisa Technologies Pvt. Ltd. V/s. Subhash Gaikwad (HUF)⁶

(vi) M/s. Hakimraj Jaichand Holdings Pvt. Ltd. V/s. M/s. Greater Nashik Infracon Private Ltd.⁷

² 2006(4) Mh.L.J. 299

³ 2012(4) Mh.L.J. 782

⁴ Summons for Judgment No.168/2012

⁵ 2012(5) Bom.C.R. 258

⁶ 2013 (7) Bom.C.R.540

⁷ 2015 SCC Online Bom. 2836

to submit that a claim for refund of security deposit will not fall under sub-section (1) of Section 41 of the Small Cause Courts Act.

12. It is correct that in all these judgments, the Courts have concluded that a suit for recovery of security deposit does not constitute a suit for recovery “of licence fee or charges or rent thereof.”

13. In *Brainvisa Technologies* (supra), the Court has held that the expression 'charges' must receive meaning from the term with which it occurs in context. The Court held that licence fees, charges and rent are periodical payments made for use and occupation whereas a security deposit is a form of security which the landlord as licensor obtains from the licensee to whom the premises are licensed for occupation. It will be useful to reproduce paragraphs 6 and 7 of the said judgment :-

“6. The judgment of the Full Bench of this Court in (*Central Warehousing Corporation vs. Fortpoint Automotive Pvt. Ltd.*), 2010 (1) Bom.C.R.560 (F.B.): 2010(1) All M.R. 497 holds that in spite of an arbitration agreement and the non obstante clause contained in Section 5 of the Arbitration and Conciliation Act, 1996, the exclusive jurisdiction of the Small Causes Court to try and decide disputes specified in Section 41 of the Presidency Small Cause Courts Act, 1882 is not ousted. However, for the provisions of Section 41 of the Presidency Small Cause Courts Act, 1882 to be attracted or for that matter, those of the corresponding provisions of Section 26 of the Provincial Small Cause Courts Act, 1887, the suit must be of a description that is mentioned in Section 41(1) of the former Act or Section 26 of the latter. A suit for the recovery of security deposit does not constitute a suit for the recovery of “licence fee or charges or rent therefor”. The expression 'charges' must receive meaning from the terms with which it occurs in context. Licence fees, charges and

rent are periodical payments made for use and occupation. A security deposit is a form of security which the landlord as licensor obtains from the licensee to whom the premises are licensed for occupation.

7. In the present case, the applicant was never placed in possession of the premises and no relief relating to the recovery of possession of any immovable property / premises has been sought. No relief pertaining to the recovery of licence fee, charges or rent has been sought. A claim for recovery of security deposit and seeking damages/compensation would not fall within the exclusive jurisdiction of the Small Causes Court. The application under Section 11(6) is, therefore, maintainable. Admittedly, there is an arbitration agreement between the parties. ”

14. Therefore, the Courts have concluded that a claim for recovery of security deposit and seeking damages/compensation would not fall within the exclusive jurisdiction of the Small Causes Court. Hence, it is quite clear that the learned Arbitrator has totally erred in coming to the conclusion that the word 'charges' will include claim for recovery of security deposit and damages.

15. Mr. Kapadia, learned counsel appearing on behalf of respondent submitted that from a reading of the statement of claim itself, it is clear that respondent also has a counter claim for outstanding licence fees/compensation as provided under the two agreements and for that respondent has already filed a suit in the Small Causes Court being Suit No. 2386 of 2014 and the same is pending. Mr. Kapadia submitted that if respondent has to prosecute in the Small Causes Court to recover the amounts payable according to respondent under the two agreements and at the same time defend the arbitration proceedings commenced by petitioner, it would cause great hardship and inconvenience to respondent. Mr. Kapadia

submitted that as for respondent's counter claim only the Small Causes Court will have jurisdiction, petitioner's claim also should be relegated to the Small Causes Court. I cannot agree with this submission of Mr. Kapadia. First of all, as stated earlier, the Arbitral Tribunal has jurisdiction to consider and entertain the claims made by the petitioner. Secondly, this submission of respondent does not even figure in the application filed under Section 16. Thirdly, from the impugned order, it also does not appear that such a point was even raised before the learned Arbitrator.

16. In the circumstances, as the claims of petitioner is arbitrable, the order dated 14th May, 2012 passed by the learned Arbitrator is set aside. The learned Arbitrator is directed to proceed with the arbitration and pass an award.

17. At this stage, Ms. Srikrishna, learned counsel appearing for the petitioner requests that another Arbitrator be appointed to proceed with the matter from the stage at which it was stopped before the Section 16 Application was filed by the respondent because, Justice K.K. Baam (Retd.), her instructions are, is not keeping best of health.

18. Mr. Kapadia, without prejudice to the respondent's rights to challenge this order if advised, agrees for appointment of another arbitrator as requested by Ms. Srikrishna.

19. Both the counsel, on instructions state that Dr. Justice S. Radhakrishnan, former Judge of this Court, be appointed as Arbitrator

[in place of Mrs. Justice K.K. Baam (retired)] to decide on the disputes and references arising out of or in connection with the Facilities Agreement and Support Services Agreement. Dr. Justice S. Radhakrishnan, former Judge of this Court is accordingly appointed. The fees and administrative expenses of the Arbitrator shall be borne equally by the petitioner and the respondent and the same will be subject to costs in the Award.

(K.R. SHRIRAM, J.)